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IN THE

Supreme Court of the United States

October Term, 1957

No. 266

HUMBLE OIL & REFINING COMPANY, *Petitioner*

v.

EDWIN K. ATWOOD, ET AL., *Respondents*

PETITIONER'S SUPPLEMENTAL ARGUMENT IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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It is quite patent from the argument filed by Respondents that they appreciate to the fullest extent the tenuous position they occupy before this Court if Petitioner's charges of "contemptuous silence" against and "obstreperous refusal" to comply with the trial court's order to replead be well founded and find support in the record. As against the charges of contemptuous attitude on the part of Respondents with respect to the trial court's order to replead Respondents' only reply seems to be (1) that their position before the trial court throughout the proceedings was that

their pleadings were in compliance with the applicable Rules of Civil Procedure, and (2) that by filing the *amendment* of September 15, 1957 they evidenced a "courteous" compliance with the trial court's order. As Petitioner views Respondents' position, if either or both of the above contentions be unsupported by the record, Respondents for all intents and purposes concede the propriety of granting the writ petitioned for.

An analysis of the record is all that is needed to support Petitioner's charges and to refute Respondents' contentions. The order of dismissal contains the following recitation:

> "Thereafter,* *at plaintiffs' request, and without objection*, the time for filing such repleader was extended by the Cour to August 15, 1955, *at which time, plaintiffs having failed to comply*, counsel were notified by the clerk, at the Court's direction, that unless plaintiffs had complied with the order to replead by September 6, 1955, a motion to dismiss would be entertained by the Court." (R. 200, second par.)

Plaintiffs' request for the extension of time within which to replead as noted by the Court in the above extract from the order of dismissal is shown by letter from plaintiffs' counsel to the trial judge at page 157 of the Record and it will be noted that neither the letter from counsel to the judge nor the extract from the order of dismissal shows any contention on the plaintiffs' part that the pleadings then on file were sufficient under the Rules or that plaintiffs intended to "stand" on the pleadings then before the Court. *Additional time* and *time alone* is what plain-

*Viz, after the first pre-trial conference of May 6, 1955 at which conference the Court entered his order requiring Respondents to replead

tiffs then sought and every indication then given to the Court pointed to an intention to replead if the additional time sought for compliance with the Court's order was granted.

Thereafter a second pre-trial conference was held, at which time:

> "Counsel for plaintiffs were reminded of the fact that on May 6, 1955 . . . the Court had entertained the view that the plaintiffs' complaint did not comply with Rule 8 in that it failed to set out by a short and plain statement the claims which the plaintiffs asserted, and the relief which they demanded; and that plaintiffs had been ordered to replead by August 1, 1955, which time had been extended at plaintiffs' request to August 15, and had been further extended at plaintiffs' request to the date of the pre-trial hearing." (Excerpt from proposed pre-trial order which was not entered, R. 163.)

The Court concluded this order by again extending the time to replead, this time until September 15, 1955. (R. 168).

Respondents filed extensive objections to this proposed pre-trial order (R. 169-172) but not one word, syllable or phrase appears in these objections indicating to the Court that Respondents contended that their pleadings were in compliance with Rule 8, or that they considered the Court in error in ordering a repleader of the case, or that they intended to stand upon their Complaint as then on file. In fact the record reflects just the contrary, for the day following the filing of their objections to the pre-trial order, that is, on September 15, 1955 plaintiffs wrote a letter to the Judge advising him that they had filed

their "Amendment"—aiding to their Complaint—and, somewhat apologetically stated that "the Amendment we have filed is the most we can do *at this time*," (R. 173), implying that, given additional time and additional information they would attempt compliance with the Court's previous and somewhat numerous orders to replead. And, significantly, it will be noted that in this letter last referred to no contention is made that the amendment is in compliance with the order to replead—the amendment was just "the most we can do at this time".

Thereafter (on September 21, 1955), the Court advised counsel that, in his opinion, this "so-called amendment filed by plaintiffs does not comply either with the letter or spirit" of the order he had theretofore entered in the case. (R. 187.) And, again significantly, though Respondents had shown a marked penchant for writing letters of objection to the Court, the record is devoid of any showing of disagreement with the Court regarding the views he entertained about the "so-called" amendment to which he referred in his letter of September 21. Apparently, at that time Respondents considered his order to replead as well founded.

The next recordation of events is a notification by the clerk, dated October 25, 1955, notifying counsel that the following calendar notation had been entered by the Court:

> ". . . the date within which plaintiffs may file an amended pleading in which to state clearly and concisely the nature of their cause and the relief sought, is extended to November 7, 1955. *No further extensions will be granted.*" (R. 195.)

Again, after the receipt of this notification not one word of objection was voiced by Respondents, not one claim was made to the Court that the "Amendment", of September 15, 1955 constituted a compliance with the order to replead; and most significantly of all, not one word is shown in the record evidencing that Respondents advised the Court that they considered their pleadings sufficiently in compliance with Rule 8 that they had elected to "stand" on the pleadings then on file.

November 7th came and passed with no attempt whatever to comply with the calendar entry next above noted, and with no attempt whatever to explain, justify or excuse the non-action on Respondents' part. In an attempt to refute Petitioner's charge of "contemptuous silence" and "standing mute and in stony silence" Respondents now represent to this Court that "ten days *before* the order of dismissal was entered" they filed a motion in which they informed the Court that they relied upon their existing pleadings as being in compliance with Rule 8. (See Respondents' Brief, last paragraph, page 8.) Respondents cite Record, page 206, in support of this statement. By referring to page 206 of the Record it will be noted first, that the motion Respondents referred to was *never* filed, as no file mark is noted by the clerk. It will be noted secondly that plaintiffs captioned their motion "Plaintiffs' Motion to *Set Aside, Alter* or *Amend* Order of Dismissal". And finally, it will be noted from the first paragraph of the motion that plaintiffs seek to have the Court:

> " . . . set aside, alter or amend its order of dismissal *heretofore entered* . . ." (R. 206.)

It is just a little difficult for Petitioner to understand how an order of dismissal could be set aside, altered or amended ten days *before* it is entered. It is just as difficult to understand how a motion seeking to accomplish that purpose could be filed ten days *before* the entry of such an order. The answer is, of course, that the order had been, as the motion itself stated, *theretofore* entered, and Petitioner rather suspects that Respondents' present representation to this Court that the motion was filed *before* such entry is a sort of oblique attempt on Respondents' part to lend credence to their bitter attack (Respondents' Brief, page 8) on Petitioner's statement (Pet. footnote, page 9) that Respondents for the first time, in their brief before the Court of Appeals, made it known that they had "elected to stand upon their complaint," while before the Trial Court they had stood mute and in stony silence had ignored the order to replead.

Not only is the above representation that Respondents made known to the Court their contention of "Compliance" *before* entry of the order of dismissal directly in conflict with the record, but it should also be noted that *Respondents have made no attempt whatever* in their brief before this Court to explain or justify in any degree their action—or non-action—in failing and refusing to replead by August 15, 1955, as ordered by the Court in the order extending the time therefor, entered on July 5, 1955. (R. 159). Nor do they offer any reason, excuse or justification for their action—or non-action—in "standing mute" and in "stony silence" against such order, necessitating the following entry on the Court's Motion Calendar on August 23, 1955:

> "It having been called to my attention that plaintiff has failed to file an amended petition originally set for August 1st, or within time as extended to August 15th, a motion to dismiss the action will be entertained on September 6, 1955, unless the amendment be filed before this date." (R. 161.)

The record reflects, from beginning to end that the trial court was dealing constantly with an obstreperous attorney, who, as Petitioner has already stated in its Petition, was ignoring every order entered by the trial court the same as though the Congress had abolished the Court in which those orders were being made and entered.

Respondents' position that their "Amendment" of September 15, 1955 constituted a full and "courteous" compliance with the trial court's order to replead is even more difficult to comprehend. After quoting from Petitioner's charges that Respondents "stood mute" and refused to replead and that Respondents were guilty of "defiant and obstreperous" conduct, Respondents say:

> "The foregoing statements are wholly unjustified. The record conclusively shows, not only that Respondents sought and obtained a pre-trial conference with the trial judge *in an effort to straighten out the pleadings*, but that, far from refusing to replead, they actually did replead by filing an amendment to their original complaint which was founded upon the trial judge's proposed 'pre-trial order' in that it actually used his own language in stating Respondents' claims, although *the amendment was even more concise* (being several pages shorter) *than the trial court's statement of the same claims* in his proposed 'pre-trial order'." (Respondents' Brief, par. 2, page 8.)

Let us analyse this remarkable statement. First, it constitutes an admission that something was seriously wrong with the original complaint, for, if not, why would Respondents feel it necessary to seek and obtain a pre-trial conference in an effort to *"straighten out the pleadings"*? If the pleadings were in conformity with Rule 8, as Respondents now claim them to be they did not need to be "straightened out". If they were in violation of Rule 8, as the trial judge had held them to be they did need to be "straightened out".

And how do Respondents *now* say they "straightened out" these objectionable pleadings? By filing *additional* pleadings, which they say in their brief, page 6, "compressed all of Respondents' principal claims into four pages," and which they further say, page 8, of their brief was "even more concise (being several pages shorter) than the trial court's statement of the same claims"! If the trial judge in his proposed pre-trial order was able to "compress" the averments of Respondents' 112 page original complaint into 6 pages, and Respondents were able to further "compress" the trial judge's already "compressed" statement of Respondents' claims into an "even more concise" statement consisting of only four pages (Respondents' Brief, page 8) it would seem that Respondents, by their own admissions fully confirm the trial court's indictment of "redundancy" and "verbosity" against the original complaint beyond the peradventure of the slightest doubt. Furthermore, if these *additional* counts and paragraphs merely *restated*, in "compressed" form, the claims set forth in the prior 112 pages of the original complaint, it seems obvious to Petitioner that Respondents must admit that their pleadings in the *amended* form met every definition which could be given of "repetitiousness" and "verbosity".

Respondents thus find themselves in a most peculiar position before this Court, for they are now saying that they pleaded their claims twice in the trial court—once with such redundancy, prolixity and verbosity that they needed a pre-trial conference to straighten them out, and once concisely, by "compressing" the 112 page redundant, prolix and verbose complaint into only a four page "Amendment" —leaving the whole of the two pleadings—the good and the bad—still live and before the Court. With this we agree. With this the trial judge agreed. And it was this very condition of their pleadings which the trial judge held, determined and decreed constituted a violation of Rule 8 of the Rules of Civil Procedure; and it was this very condition of their pleadings which Respondents determinedly refused to correct. It was this determined refusal on their part which brought upon them the order of dismissal and the judicial sanctions of which they now so bitterly complain.

If their present contention be true that the *whole* of their principal claims was fully set forth in the four pages of their *addition* to the original complaint, why were the obsolete 112 pages of the original complaint left as live pleadings before the Court? If the amendment of only four pages was sufficient unto itself and was "even more concise" in setting forth the principal claims asserted and the relief demanded than the trial judge's analysis of Respondents' suit, is Respondents' assertion that the amendment "straightened out" the confused condition of their pleading a logical deduction to reach when the confused 112-page original pleading was still before the Court with all of its complexities, verbosity and redundancy? If Respond-

ents' position before this Court be sound and be given credence, then fair treatment of the trial judge and his orders would have dictated the filing of the averments in the so-called amendment *in place and in lieu* of the original confused and complex complaint and not as an *addition* to it—for the *addition* merely added to the already confused condition of the pleading which admittedly needed some clarification through a "straightening out" procedure. And, had this been done, Respondents, by their own admission would have had their claims adequately before the Court and in full compliance with Rule 8, the provisions of which the trial judge was almost in desperation seeking to enforce.

Petitioner submits, therefore, that Respondents, by their own admissions, have shown that the trial judge properly ordered the repleader of a complaint which was in flagrant violation of Rule 8 of the *Federal Rules of Civil Procedure*, and that, as a consequence of their defiant attitude of refusal to comply with the order to replead they invited the sanctions provided for in Rule 41. Petitioner relies, threrefore, on the grant of relief as prayed for in its Petition on file herein.

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By SIGNED: FELIX A. RAYMER
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Certificate of Service

I, Felix A. Raymer, counsel for Petitioner and a member of the Bar of this Court, certify that, in accordance with the provisions of Rule 33(1) I did, on this 19th day of September A. D. 1957 serve opposing counsel with adequate copies of this supplemental argument by depositing same in the United States mails with adequate first class postage prepaid to assure delivery, addressed to Honorable David Bland, Bank of the Southwest Building, Houston 2, Texas.

ORIGINAL SIGNED: FELIX A. RAYMER

FELIX A. RAYMER